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**Boulder Contracting, Inc. and Santiago Zavala-Gonzalez.** Cases 10–CA–189876 and 10–CA–193007

March 16, 2018

**DECISION AND ORDER**

MEMBERS PEARCE, MCFERRAN, AND EMANUEL,

The General Counsel seeks a default judgment in this case on the ground that Boulder Contracting Inc. (the Respondent) has withdrawn its answer to the complaint. Upon a charge and amended charges filed by Santiago Zavala-Gonzalez on December 15, 2016, January 3, 2017, and February 14, 2017, the General Counsel issued a complaint against the Respondent on April 27, 2017, and a consolidated complaint against the Respondent on June 7, 2017, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act.

The Respondent filed answers to the complaint and the consolidated complaint. However, on August 15, 2017, the Respondent withdrew both of its answers.

On September 13, 2017, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On September 15, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively states that unless an answer is received on or before June 21, 2017, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Although the Respondent filed an answer to the complaint on May 11, 2017, and the consolidated complaint on June 20, 2017, it later withdrew its answers. The withdrawal of an answer has the same effect as failure to file an answer, i.e., the allegations in the complaint must be considered to be true.<sup>1</sup> Accordingly, based on the withdrawal of the Respondent's answer, we deem the allegations of the complaint to be

<sup>1</sup> See *Maislin Transport*, 274 NLRB 529 (1985).

admitted as true, and we grant the General Counsel's Motion for Default Judgment, as detailed below.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a Georgia corporation, has been engaged in installing drainage systems at various locations in the greater Atlanta, Georgia area, with a headquarters in Canton, Georgia.

During the calendar year ending December 31, 2016, the Respondent, in conducting its operations described above, purchased and received at its Canton, Georgia facility goods valued in excess of \$50,000 directly from points outside the State of Georgia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Antonio Mendoza	-	Foreman (Supervisor)
Jack Treadwell	-	Owner
Juan Zavala	-	Foreman (Supervisor)

About November 24, 2016, the Respondent's employees Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales engaged in concerted activities with each other for the purposes of mutual aid and protection by walking off the jobsite because they did not receive their weekly paychecks. About November 24, the Respondent discharged Zavala-Gonzalez, de Hoyos de Leon, and Gonzales. The Respondent engaged in the conduct described above because Zavala-Gonzalez, de Hoyos de Leon, and Gonzales engaged in the conduct described above and to discourage employees from engaging in these or other concerted activities.

**CONCLUSIONS OF LAW**

By the conduct described above the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.<sup>2</sup>

<sup>2</sup> The consolidated complaint also alleges that the Respondent violated Sec. 8(a)(1) by misclassifying its workers as independent contractors rather than employees, thereby inhibiting them from engaging in Sec. 7 activity and depriving them of their rights guaranteed under the Act. This unfair labor practice theory is currently under consideration

The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by discharging Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, we shall order the Respondent to make Zavala-Gonzalez, de Hoyos de Leon, and Gonzales whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Zavala-Gonzalez, de Hoyos de Leon, and Gonzales for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>3</sup>

We shall further order the Respondent to compensate Zavala-Gonzalez, de Hoyos de Leon, and Gonzales for any adverse tax consequences of receiving a lump-sum

backpay award and to file with the Regional Director of Region 10 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent additionally shall be ordered to remove from its files any references to the discharges of Zavala-Gonzalez, de Hoyos de Leon, and Gonzales and to notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, Boulder Contracting Inc., Canton, Georgia, its officers, agents, successors, and assigns shall

##### 1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(c) Compensate Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form,

in *Velox Express Inc.*, 15-CA-184006, where the Board has invited all interested parties to file briefs addressing the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?" *Notice and Invitation to File Briefs*, February 15, 2018. Accordingly, we shall deny the motion for default judgment with respect to this allegation and remand it for further appropriate action.

<sup>3</sup> The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Canton, Georgia facility, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 16, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, offer Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharges of Santiago Zavala-Gonzalez, Ruben de Hoyos de Leon, and Gabriel Gonzales and WE WILL, within 3 days thereafter, notify them in writing that this

has been done and that the unlawful discharges will not be used against them in any way.

BOULDER CONTRACTING INC.

The Board's decision can be found at [www.nlr.gov/case/10-CA-189876](http://www.nlr.gov/case/10-CA-189876) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

